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In the Supreme Court of the United States

OCTOBER TERM, 1994

RESOLUTION TRUST CORPORATION, AS RECEIVER FOR MID KANSAS SAVINGS & LOAN ASSOCIATION AND FIRST FEDERAL SAVINGS & LOAN ASSOCIATION, PETITIONER

v.

HOMELAND STORES, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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Our petition for a writ of certiorari asks this Court to resolve whether the statutory exhaustion requirement established in 12 U.S.C. 1821(d)(13)(D) (Supp. IV 1992) applies to claims—such as respondent's contract claim—that are based upon the alleged acts or omissions of the receiver of a failed financial institution. Respondent puts forward five arguments why that issue should not be resolved in this case. None of those arguments has merit.

1. Respondent first contends (Br. in Opp. 6, 10-11) that review should be deferred because the appeal in this case was interlocutory. As we explain in our petition (Pet. 11-12), this Court has repeatedly recognized that the

interlocutory posture of a case does not preclude this Court's review if the question presented is "fundamental to the further conduct of the case." *Land* v. *Dollar*, 330 U.S. 731, 734 n.2 (1947); *United States* v. *General Motors Corp.*, 323 U.S. 373, 377 (1945). See generally R. Stern et al. *Supreme Court Practice* § 4.18, at 195-198 (7th ed. 1993).

The exhaustion inquiry at issue here is fundamental because it determines whether the district court has subject matter jurisdiction over respondent's suit. See *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 684-685 & n.3 (1949) (review appropriate because jurisdictional issue was fundamental to further conduct of case); *Land* v. *Dollar*, 330 U.S. at 734 & n.2, 739 (same); *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 52 (1938) (review of order granting preliminary injunction appropriate where "there was an insuperable objection to the maintenance of the suit in point of jurisdiction"). Resolution of the exhaustion issue at this stage would prevent the parties and the trial court from having to devote substantial resources to try this case, only to discover at some later stage that the court lacked jurisdiction. Moreover, Congress crafted the exhaustion requirement to provide the receiver with an opportunity, before suit is brought, to examine outstanding claims and to determine whether to accept or contest them. See *Coit Independence Joint Venture* v. *FSLIC*, 489 U.S. 561, 584 (1989) (noting the importance of screening thrift receivership claims through a "centralized claims process"). Postponing consideration of the exhaustion requirement until a final judgment is entered in the litigation would defeat the purpose of that statutory provision.

Respondent's objections to review of this interlocutory decision have especially diminished force

because the district court certified and the court of appeals accepted this case for interlocutory review pursuant to 28 U.S.C. 1292(b). Thus, the lower courts agreed that the issue presented here "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." Pet. App. 4a (quoting 28 U.S.C. 1292(b)). In cases that otherwise warrant review, this Court has granted petitions for writs of certiorari in litigation that has been properly certified pursuant to that procedure. See, *e.g.*, *United States* v. *Stanley*, 483 U.S. 669, 675-676 (1987); *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. 176, 180 n.4 (1982)

There is no merit to respondent's contention (Br. in Opp. 11) that review should be denied here because the government generally opposes petitions by defendants seeking interlocutory review in criminal cases. As this Court has noted, interlocutory review is particularly disfavored in the criminal context, because "the delays and disruptions attendant upon intermediate appeal are especially inimical to the effective and fair administration of the criminal law." *DiBella* v. *United States*, 369 U.S. 121, 126 (1962). The considerations that guide the government's approach to petitions by defendants in criminal cases, where a final judgment of acquittal generally eliminates any occasion for either party to seek further review, have little relevance to this civil case.

2. Respondent argues (Br. in Opp. 6-7, 11-14) that this case has become moot because, after the court of appeals reached its decision, respondent filed an administrative claim with the RTC. Respondent's belated administrative filing, however, does not have that effect. Section

1821(d) creates an administrative claims procedure for receivership claims and allows judicial review of unsatisfied claims at the conclusion of the administrative process. See 12 U.S.C. 1821(d) (5) and (6) (Supp. IV 1992). Section 1821(d)(13)(D) then states that, "[e]xcept as otherwise provided in this subsection," a court shall not have jurisdiction over receivership claims, including claims based on "any act or omission" of the receiver. 12 U.S.C. 1821(d)(13)(D) (Supp. IV 1992).

The RTC has contended throughout this litigation that the district court below lacked jurisdiction, because respondent failed to comply with the mandatory administrative claims process before respondent filed its action. Respondent cannot overcome that defect by filing an administrative claim after filing its complaint. See, *e.g.*, *McNeil* v. *United States*, 113 S. Ct. 1980 (1993) (affirming dismissal of suit under Federal Tort Claims Act for lack of jurisdiction, because mandatory administrative claim was not filed until after commencement of suit); *Henderson* v. *Bank of New England*, 986 F.2d 319, 321 (9th Cir.) ("Henderson filed his complaint in the district court before exhausting his administrative remedies. The district court lacked subject matter jurisdiction over Henderson's action."), cert. denied, 114 S. Ct. 559 (1993). If it were otherwise, claimants could safely ignore the administrative claims process until a court compelled or litigation tactics dictated compliance.

This case would become moot if respondent agreed to dismiss its still-pending complaint, which was filed improperly without first exhausting the administrative claims procedure. See Pet. 12 n.9. Our position on that issue is consistent with this Court's analysis in *Deakins* v. *Monaghan*, 484 U.S. 193 (1988). The Court explained in that case that it will accept a party's representations that the party's actions have mooted the

lawsuit only if the party's actions truly bring the matter before the courts to a definitive end. See 484 U.S. at 200 n.4. In this case, respondent continues to assert (Br. in Opp. 12-13) that the lower court has jurisdiction to resolve a complaint that respondent filed before exhausting the administrative claims process. If respondent wishes to moot this case, then it must agree to dismiss that complaint and await the outcome of its pending administrative claim before proceeding with litigation.[1]

3. Respondent next argues (Br. in Opp. 7-8, 14-16) that review on the issue presented here should await a case in which the lower courts have had an opportunity to consider the RTC's recently issued interim statement of policy concerning procedures to be used with regard to claims based upon acts or omissions of a receiver. See 59 Fed. Reg. 10,663 (1994); see also 59 Fed. Reg. 48,577 (Sept. 22, 1994) (publication as a proposed rule to be codified at 12 C.F.R. Pt. 1635). This case, however, presents a continuing issue of statutory construction that is not eliminated by the statement of policy. The policy statement sets forth the RTC's official interpretation of the statute, gives formal assurance that the RTC will consider claims based on acts or omissions of the receiver in the administrative process, and explains that such claims are not subject to the statutory bar date requirement governing claims against the failed institution. See 59 Fed. Reg. at 10,664. The policy statement does not eliminate the conflict created by the decision below regarding whether a litigant may choose to bypass the administrative claims

[1] In that event, the Court would issue an order under *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950), that "strips the decision below of its binding effect." *Deakins*, 484 U.S. at 200.

procedure. Nor can it be expected to prompt the court of appeals to reconsider its ruling here in a subsequent case. As respondent acknowledges (Br. in Opp. 14), the government apprised the court of appeals of the policy statement through a petition for rehearing. The court nevertheless adhered to its holding that the claims process could be bypassed.

4. Respondent also contends (Br. in Opp. 8, 16-19) that the court of appeals' decision could be sustained on the "narrower grounds" that the "RTC voluntarily assumed [respondent's] executory lease by failing to exercise its unquestioned right under §1821(e)(1) to repudiate it" (*id.* at 8) and that respondent "is entitled to injunctive relief even if it must exhaust administrative procedures to obtain monetary relief" (*ibid.*). The court of appeals, however, did not reach either of those grounds. See Pet. App. 5a (refusing to reach the question "whether injunctive relief is available against the RTC," because that issue is not "an alternate con-trolling question"); *id.* at 12a n.6 (noting that on remand "the issue on the merits presumably would be whether the RTC indeed violated the Homestead lease"). Even assuming that respondent could prevail on those grounds in subsequent proceedings, the rulings would not displace the exhaustion issue, which is logically anterior to resolution of the merits of this case, presents a procedural question of substantial importance, and has created a conflict among the courts of appeals.

5. Finally, respondent contends (Br. in Opp. 8-9, 19-27) that the court of appeals correctly interpreted the statutory exhaustion requirement and that its decision does not create a conflict among the courts of appeals. Those contentions are wrong. As we explained in our petition, Section 1821(d)(13)(D)(ii) (Supp. IV 1992) expressly requires exhaustion of "any claim relating to

any act or omission" of the receiver. See Pet. 3-4, 7-9. The court of appeals' conclusion that the exhaustion requirement does not apply to post-receivership claims is inconsistent with the statutory text and squarely conflicts with the Third Circuit's decision in *Rosa* v. *RTC*, 938 F.2d 383, cert. denied, 112 S. Ct. 582 (1991). Contrary to respondent's suggestion (Br. in Opp. 24), the conflict with *Rosa* is not "superficial[]." The Third Circuit held that post-receivership claims are subject to the claims process, *Rosa*, 938 F.2d at 391-394, and that holding cannot be reconciled with the court of appeals' ruling here. The court of appeals itself expressly acknowledged that its decision conflicted with *Rosa*'s holding that the "jurisdictional bar does encompass a claim arising from post receivership actions of the RTC." Pet. App. 7a n.2, 14a.

As explained in our petition (Pet. 9-10), the court of appeals' decision is inconsistent with other decisions as well. Respondent implicitly acknowledges (Br. in Opp. 22), for example, that the First Circuit's conclusion on rehearing in *Heno* v. *FDIC*, 20 F.3d 1204 (1994)—that the FDIC is entitled to "an opportunity to evaluate post-bar date claims in the first instance," *id.* at 1209—cannot be reconciled with the result here. See also *Lloyd* v. *FDIC*, 22 F.3d 335, 337 (1st Cir. 1994) (applying the statutory provisions governing exhaustion of administrative remedies to a claim that arose as a result of an act or omission of the receiver).[2]

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[2] Respondent's attempt to distinguish other cases is unpersuasive. For example, respondent asserts (Br. in Opp. 26) that the Ninth Circuit's decision in *Henderson* v. *Bank of New England*, 986 F.2d 319, cert. denied, 114 S. Ct. 559 (1993), does not conflict with the court of appeals' decision here because the claims in *Henderson* arose prior to the appointment of the receiver. The Ninth Circuit observed, however, that "Henderson asserted two

In addition, since the court of appeals has issued its decision, the Second Circuit has directed a post-receivership claimant to exhaust the administrative claims process in a case that is factually similar to the case before this Court, ruling that "[a]lthough § 1821(j) precludes equitable remedies, a plaintiff may still assert a claim for damages against the RTC through the normal claims process." *Volges* v. *RTC*, Nos. 94-6061 et al. (Aug. 11, 1994), slip op. 6364. The Third Circuit has also recently reiterated its view that Section 1821(d)(13)(D)'s exhaustion requirement "is not necessarily limited to suits otherwise governed by the administrative claims procedure set out in § 1821(d)(3), (d)(5), and (d)(6)." *National Union Fire Ins. Co.* v. *City*

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claims; one monetary, the other nonmonetary. He sought $3.5 million in damages and the right to discover derogatory credit information." 986 F.2d at 321. Henderson's claim for the "right to discover the derogatory credit information" sought that right prospectively against the receiver. The Ninth Circuit nevertheless held that the district court lacked jurisdiction over that claim because Henderson had failed to exhaust the claims process prior to seeking judicial review. *Ibid.*

Respondent also argues (Br. in Opp. 27) that the D.C. Circuit's decision in *Office & Professional Employees Int'l Union, Local 2* v. *FDIC*, 962 F.2d 63 (1992), is distinguishable because "[n]o issue was presented as to the necessity of exhausting administrative remedies." In that case, the plaintiff had tried to comply with the administrative claims process before filing suit, but the FDIC had concluded that the claimant was not eligible to file an administrative claim. See 962 F.2d at 64. The D.C. Circuit rejected the FDIC's position, noting that the statute's "very text appears to contemplate claims beyond those by 'creditor[s] . . . on the . . . books' to whom statutory notice must be sent." *Id.* at 67 (citing 12 U.S.C. 1821(d)(13)(D) (Supp. IV 1992)). Thus, the D.C. Circuit rejected the rationale that the court of appeals relied upon in this case.

Savings, F.S.B., 28 F.3d 376, 386, 392 (1994). And the Fourth Circuit has recently held in an unpublished decision that Section 1821(d)(13)(D)'s exhaustion requirement "applies to claims arising both before and after RTC's appointment as receiver." *Brown* v. *RTC*, Nos. 93-2597 et al. (July 25, 1994), slip op. 5. Thus, the Tenth Circuit's decision stands in marked opposition to prevailing law. The Court should resolve that conflict.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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